(1) Supreme Court, U.S.
FILED

941902 MAY 1 - 1995

OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

FRANCISCO ROBERTO FAUSTO-RENDON,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Homero Torralba
Attorney of Record for Petitioner
NELSON & TORRALBA, P.C.
55 West Franklin Street
Tucson, Arizona 85701
(520) 884-4529

Stellisa Scott
NELSON & TORRALBA
55 West Franklin Street
Tucson, Arizona 85701
(520) 884-4529

11 pp

QUESTION PRESENTED

WHETHER THE DISTRICT COURT'S DENIAL OF JURISDICTION ON THE GROUNDS THAT DEFENDANT, IN WAIVING HIS RIGHT TO APPEAL AS PART OF A PLEA AGREEMENT, WAIVED THE RIGHT TO APPEAL ANY AND ALL SUBSEQUENT LEGAL PROCEEDINGS UNFORESEEABLE TO DEFENDANT AT THE TIME OF WAIVER, WAS VIOLATIVE OF DEFENDANT'S FIFTH AMENDMENT RIGHT TO DUE PROCESS OF LAW.

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

FRANCISCO ROBERTO FAUSTO-RENDON,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

The Petitioner, FRANCISCO ROBERTO FAUSTO-RENDON, respectfully requests a Writ of Certiorari be issued to review the opinion of the United States Court of Appeals for the Ninth Circuit.

DECISION BELOW

United States v. Francisco Roberto Fausto-Rendon, 46 F. 3d 1146 (9th Cir. 1995). (Attachment A)

SUPREME COURT JURISDICTION

On January 29, 1995 the Ninth Circuit of Appeals dismissed Petitioner's appeal from the United States District Court for

the District of Arizona on the grounds that the Court of Appeals lacked jurisdiction over the matter. Thus, this Petition is timely filed pursuant to Rules 13 and 29, Rules of the Supreme Court.

This court has jurisdiction under Title 28, United States Code § 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

> No person shall . . . be deprived of life, liberty, or property without due process of law; . . .

STATEMENT OF THE CASE

On January 5, 1994, an indictment was filed in the United States District Court for the District of Arizona charging Defendant with conspiracy to possess, and possession with intent to distribute a quantity of marijuana in violation of Title 21 § 841 (a) (1).

On March 22, 1994, Defendant FAUSTO-RENDON entered into a plea agreement with the government which included a provision that Defendant FAUSTO-RENDON agree to waive all rights to appeal.

On May 31, 1994, Defendant FAUSTO-RENDON was sentenced to a term of incarceration of 36 months. Statutory time limits for the Government to seek post sentence relief lapsed, and, at that time the crimi-

nal proceedings against Defendant FAUSTO-RENDON were concluded.

Subsequent to the resolution of the criminal proceedings against Defendant FAUSTO-RENDON, and after the time in which to file a request for post sentence relief lapsed, the Government instituted new proceedings, purely procedural in nature, by filing a Motion to Correct Defendant FAUSTO-RENDON'S sentence.

The district court granted the Government's Motion for Modification of Sentence, extending Defendant FAUSTO-RENDON'S sentence from a period of incarceration of thirty six months to a period of sixty months.

Defendant FAUSTO-RENDON appealed the district court's ruling on the grounds that the district court erred in granting the Government's motion to correct his sentence because (1) the sentencing Court did not timely grant relief under Fed. R. Crim. P. 35(c), (2) the government failed to timely seek relief under Rule 35(a), and (3) the government is not entitled to substantive relief under Rule 35(a).

The Court of Appeals denied jurisdiction to hear the case "because Fausto waived his right to appeal in his plea agreement."

REASONS FOR GRANTING THE WRIT

THE DENIAL OF JURISDICTION BY THE NINTH CIRCUIT COURT OF APPEALS SERVES TO SANCTION THE DISTRICT COURT'S DE-

PARTURE FROM THE USUAL AND ACCEPTED COURSE OF JUDICIAL PROCEEDINGS SO AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The usual and accepted course of judicial proceedings regarding criminal matters is set forth in the Federal Rules of Criminal Procedure. The district court's granting the Government's Motion for Modification of Sentence beyond the time frame provided by the Rules for so doing was a substantial departure from the accepted and usual course of judicial proceedings.

By denying jurisdiction to hear the appeal, the Court of Appeals sanctions the district court's departure from the usual and accepted course of judicial proceedings as set forth in the Rules.

In so doing, the Court of Appeals violates Defendant FAUSTO-RENDON'S right to due process of law insofar as he is foreclosed from seeking relief for the Government's misconduct, and the Government is immune from being held accountable therefore.

Should the Court of Appeals opinion stand, with every plea agreement whereby a defendant waives his rights to appeal, the Government is free to conduct proceedings subsequent thereto unchecked and without threat of review.

In the case at bar, the subject plea agreement was entered into between Defendant FAUSTO-RENDON and the Government as

the mechanism for disposing of the narcotics charges for which FAUSTO-RENDON had been indicted. In executing the plea agreement, Defendant FAUSTO-RENDON waived any right to appeal substantive issues pertaining to those charges, including any adverse rulings on pretrial motions.

Defendant FAUSTO-RENDON did not waive the right to appeal any and all subsequent legal proceedings, as yet unforeseeable, that may be levied against him by the Government at some future date. Such was the understanding and intention of Defendant FAUSTO-RENDON when he entered into the agreement. Such is the understanding of any Defendant who enters into a plea agreement and must contend with future proceedings brought by the Government after the case is presumably disposed of and time for relief has lapsed.

Thus, in denying jurisdiction, Defendant FAUSTO-RENDON is bound, without due process of law, by a provision of the plea agreement that is contrary to his understanding and intention.

With all due respect, due process mandates Defendant FAUSTO-RENDON the opportunity to have the merits of his appeal considered.

CONCLUSION

Based upon the foregoing, Petitioner respectfully requests this Court issue a Writ of Certiorari to review the opinion of the United States Court of Appeals for the Ninth Circuit.

RESPECTFULLY SUBMITTED this 12th day of May, 1995.

NELSON & TORRALBA, P.C

Homero Torralba
Attorney of Record for Petitioner

Stellisa Scott

ATTACHMENT A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 94-10412

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FRANCISCO ROBERTO FAUSTO-RENDON, aka Francisco R. Fausto-Rendon,

Defendant-Appellant

Appeal from the United States District Court for the District of Arizona William D. Browning, District Judge, Presiding
(D.C. No. CR-94-00007-WDB

Submitted January 25, 1995**

Before; WALLACE, Chief Judge, HALL and KLEINFELD, Circuit Judges

---

MEMORANDUM*

Francisco Roberto Fausto-Rendon appeals his sentence under the Sentencing

Guidelines imposed following the district court's correction of his sentence after his guilty plea to possession with intent to distribute marijuana, in violation of 21 U.S.C. § 841 (a) (1) and (b) (1) (vii).

Fausto Contends that the district court erred in granting the government's motion to correct his sentence because the sentencing court did not timely grant relief under Fed. R. Crim. P. 35(c), the government failed to seek timely relief under Rule 35(a), and the government is not entitled to substantive relief under Rule 35 (a).

The government contends that this court lacks jurisdiction because fausto waived his right to appeal in this plea agreement. We agree. See United States v. Navarro-Botello, 912 F. 2d 318 (9th Cir. 1990), cert. denied, 112 S. Ct. 1488 (1992. Because the plea agreement expressly states that "the defendant agrees to waive all rights to appeal," we reject Fausto's argument that the intended his waiver to apply only to substantive issues relating to the criminal charges for which he had been indicated.

DISMISSED.

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.